

82-1125

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ALEXANDER L. STEVAS,

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JONATHAN L. HAAS,
Petitioner,
v.
EDGAR HASH and ELAINE HASH,
Respondents.

Petition for a Writ of Certiorari
to the Court of Appeals of Arizona

Jonathan L. Haas
In Propria Persona
P.O.Box 7461
Phoenix, Arizona 85011
602-277-6001

Volume 1 of 2

QUESTION PRESENTED

Whether the Arizona Court of Appeals denied the Petitioner the due process of law when it

1. Failed to hold that the Corrected Corrected Judgment in the underlying Malicious Action, Cause C-349188, Superior Court of Maricopa County, State of Arizona, was procured by collateral fraud, and did not avail Defendants Hash a complete defense in an action for malicious prosecution;

2. Affirmed the trial court's requirement that the underlying malicious action, Cause C-349188, must terminate by a "favorable termination" rather than a "final termination".

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the following is a complete list of all parties to the proceedings below:

Jonathan L. Haas

Edgar Hash

Elaine Hash

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v.

EDGAR HASH and ELAINE HASH
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Petition For A Writ Of Certiorari
To The Court Of Appeals Of Arizona

Petitioner, Jonathan L. Haas, prays that
a Writ of Certiorari issue to review the
judgment of the Court of Appeals of the State
of Arizona entered in this matter on July 27,
1982.

OPINION BELOW

The Opinion of the Court of Appeals of
the State of Arizona, and the judgment of the
Superior Court of the State of Arizona in and

for the County of Maricopa are reproduced in the Appendix.

JURISDICTION

The Arizona Court of Appeals entered its Memorandum Opinion on July 27, 1982. (App.1a-11a). The Arizona Court of Appeals denied Petitioner's timely Motion for Rehearing on September 1, 1982. (App.17a). The Arizona Supreme Court denied Petitioner's timely Petition for Review on September 28, 1982. (App.19a). On October 6, 1982, the Court of Appeals issued its Mandate to the Superior Court for action consistent with the Court's Opinion. (App.40a). A Judgment pursuant to the October 6 Mandate was entered by the Superior Court on October 14, 1982. (App.42a-44a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment XIV of the Constitution of the United States of America:

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Jonathan L. Haas, has been denied a full and fair hearing in a malicious prosecution action against Respondents Edgar Hash and Elaine Hash, his wife.¹

Background

In 1974 Wanda Yates, Executrix of the Estate of Flora Holman (YATES), employed Ed Post Realty, an Arizona real estate company, to sell a delapidated old house located at 2226 North Dayton, Phoenix, Arizona.²

Petitioner, Jonathan L. Haas (HAAS), a licensed real estate salesman employed by Ed Thirkhill Realty, an Arizona real estate

1. Elaine Hash is a party to this action only due to Arizona community property law.

2. The legal description is Lot 11, Block 1, PHOENCIA, Maricopa County.

company, procured an offer from State Investment Corporation (STATE) to purchase the property. The purchase price was \$12,500; down payment of \$1,500; and deferred balance of \$11,000 to be evidenced by an agreement for sale assignment.

This offer to purchase (App.45a-53a) was forwarded to Ed Post Realty by HAAS.³ The offer was delivered by Ed Post Realty to Edgar Hash's office. This offer to purchase the property was accepted by Edgar Hash (HASH) as attorney for YATES on November 20, 1974.

YATES did not sign the purchase contract and did not see it until after the Probate Court approval of the sale. HASH, as attorney for YATES, handled the acceptance of the purchase contract and Probate Court approval of the sale for YATES.

Pursuant to the purchase contract and upon advice of her attorney HASH, YATES executed a

3. The custom in the real estate trade in Arizona is for the selling broker (Ed Thirkill Realty) to deal only with the listing broker (Ed Post Realty), and the listing broker to deal directly with his client, the seller of the property.

warranty deed, dated November 22, 1974, notarized December 17, 1974, and recorded December 23, 1974.

At the time of closing of the escrow on this property STATE assigned a collection account at The Title Insurance Company of Minnesota and did not assign any real property interest to YATES as security. HASH became aware of this after close of escrow and conveyance of title to the property to the buyer, STATE. To remedy this situation HASH entered into negotiations with R. Richard Rowe, President of STATE (ROWE) to acquire some real property interest as security for his client, YATES.

HASH tried to safeguard his client's interest by obtaining an actual assignment of a realty mortgage as security for the deferred balance. HASH and ROWE created a realty mortgage⁴ and assignment, a mortgage which

4. ROWE, personally, was mortgagor and ROWE, as President of State Investment Corporation, was the mortgagee.

both HASH and ROWE knew was in second position. (App.54a-61a & 62a-64a). HASH did not request a title search on the mortgaged property nor did he obtain title insurance⁵ to insure the mortgage was in first position to further protect his client, as he already knew that it was in second position.

Although dated prior to the date of closing of the escrow, the mortgage and assignment were not drawn until after the close of escrow at the request of HASH. The mortgage was executed by ROWE as mortgagor to STATE as mortgagee and recorded on January 30, 1975. The assignment instrument, prepared by HASH and dated December 20, 1974, refers to the realty mortgage recorded January 30, 1975.

In April, 1977, American Savings Life Insurance Company, the mortgagee in first position on the property filed a foreclosure action (Cause C-349188, Superior Court of Maricopa County, State of Arizona) naming

5. Arizona is a title insurance state and is not an abstract state.

YATES, among others, as defendants.

On September 19, 1977, YATES filed a Third Party Complaint against HAAS. The Complaint was prepared and signed by HASH, attorney for YATES. Specifically, the Third Party Complaint alleged:

"...that said mortgage which was assigned was fraudulently represented by the Third Party Defendant HAAS...to the Third Party Plaintiff YATES as a valuable first mortgage equivalent to the property sold to STATE INVESTMENT CORPORATION by the Third Party Plaintiff YATES in probate sale."

The Third Party Complaint further alleged:

"That the Defendant Haas...knew that said representations were false and intended that they be acted upon by the Defendant YATES as reasonably contemplated...The Defendant YATES relied on such representations...and that she had a right to rely thereon and did so to her damage..."

The allegations in the Third Party Complaint relate to the mortgage and assignment of mortgage, which mortgage was recorded on January 30, 1975. Even though the assignment is dated December 20, 1974, it is impossible for it to have existed prior to January 30, 1975, because it refers to the

mortgage by docket and page number, as well as recording date (January 30, 1975). The mortgage also did not exist prior to the close of escrow⁶ on the property. This is confirmed by both HASH and ROWE in their depositions.

Therefore when HASH and YATES alleged in the Third Party Complaint that HAAS misrepresented the mortgage and assignment to YATES prior to acceptance of the offer to purchase the property (November 20, 1974) they well knew that the allegations were false, because these instruments had not yet been created by HASH and ROWE. The Third Party Complaint was signed by HASH, not YATES. HASH knew the allegations were false.

YATES never met, talked to, communicated with, contacted, employed, contracted with or

6. In Arizona it is customary for the grantor to deposit all instruments required to convey title to real property with an escrow agent, usually a title insurance company. When the conveyance is subject to conditions and the instruments are in possession of the third party this is called an escrow. Upon delivery to the grantee by the depository the instruments take effect.

relied upon HAAS in regard to the sale of the property. This is confirmed in the interrogatories of YATES. HASH, as attorney for YATES, handled all matters, documents and instruments relating to the sale of the property, and YATES relied on her attorney, HASH, her real estate broker, Ed Post Realty, and her salesman, Ron Stacey, all of which is confirmed in the interrogatories of YATES.

A Motion for Summary Judgment was made by HAAS in the Third Party Complaint praying that:

"...summary judgment be entered against Third Party Plaintiff dismissing this action against Third Party Defendants...Haas and awarding court costs and attorneys fees to Third Party Defendant, Haas."

Oral argument on this Motion for Summary Judgment was set for November 16, 1979.

On November 14, 1979, HASH as attorney for YATES, contacted David Postal, attorney for HAAS, and offered not to oppose the Motion for Summary Judgment if HAAS agreed to waive legal fees. It was so stipulated and there was no oral argument on HAAS's Motion for Summary

Judgment. On November 16, 1979, the Honorable Stanley Goodfarb, Judge of the Superior Court, entered a minute entry of summary judgment in favor of HAAS (App.65a), stating in part:

"IT IS ORDERED, granting Summary Judgment in favor of the Defendants, Jonathan L. Haas and Hiroe Haas in the sum of \$65.00. Counsel for defendant Haas shall prepare a Judgment and submit same to the Court for signature."

The formal Summary Judgment in the Third Party Complaint was lodged with the Court on December 1, 1979; a copy being mailed to HASH and the Court. (App.67a-69a). On January 8, 1980, the Court signed the formal Summary Judgment. (App.69a). This Judgment stated in part:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Third Party Defendants, HAAS' Motion for Summary Judgment is granted and that Third Party Plaintiff's action against Third Party Defendant, JONATHAN L. HAAS and HIROE HAAS is dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Third Party Defendants have judgment in the sum of \$65.00 as and for costs, with interest thereon at the rate of 6% per annum from doid(sic) until paid."

Proceedings in the Trial Court

On January 11, 1980, this malicious prosecution action was filed. (Cause C-402225, Superior Court of Maricopa County, State of Arizona). On February 5, 1980, over two months after the formal Summary Judgment was lodged with the Court, HASH challenged the Summary Judgment, signed January 9, 1980, in the Third Party Complaint (Cause C-349188) by submitting a Motion to Correct Judgment and Notice. (App. 72a-76a). It stated in part:

"Contrary to the minute entry, defendant and counsel prepared a more formal form of judgment which seemed to imply that the court was considering the merits of the case after argument. The only relief granted was for judgment for the defendant and costs, all pursuant to a stipulation as set out in the minute entry...The differences were not noticed until after Defendant Haas filed a complaint for malicious prosecution against Third Party Plaintiff's counsel two days following the entry of judgment."

This Motion to Correct Judgment was opposed unsuccessfully by HAAS (App.77a-80a) and a Corrected Judgment was lodged with the Court by HASH as counsel for YATES on March 20, 1980, pursuant to the minute entry of

March 3, 1980.⁷ (App.83a-85a). The Corrected Judgment (App.86a-89a) read in pertinent part:

"There was a stipulation by counsel for the granting of the summary judgment upon the payment of costs of \$65.00 and that there was no determination of the motion on the merits, and the stipulation indicated that such was not to be done...

It further appears that this determination now has been utilized by the Defendant Haas as the basis for a malicious prosecution action."

The Corrected Judgment then grants the same relief as the Summary Judgment signed by the Court on January 9, 1980:

"IT IS FURTHER ORDERED, in conformity with said stipulation and agreement of counsel, that the Defendants, Jonathan L. Haas and Hiroe Haas have judgment against the Personal Representative of the Estate of Flora Holman, Deceased, in the sum of \$65.00 as and for court costs."

HAAS objected to the form of this Corrected Judgment (App.90a-92a) and the Court

7. The minute entry of November 16, 1979(App.65a-66a) states that "...no one will appear..." for oral argument and the minute entry of March 3, 1980(App.83a-85a) states "...and having reflected upon its own recollection of the hearing on the motion for summary judgment...". There appears to be some question of the memory of the trial court.

struck some of the more obnoxious language by minute entry of April 14, 1980.(App.93a-94a). So the adjudication of Cause C-349188 Third Party Complaint was a Corrected Corrected Judgment granting HAAS the relief prayed for in his Motion for Summary Judgment, except legal fees. (App.95a-98a).

On this same day, April 14, 1980, HASH filed a Motion for Summary Judgment alleging that the prior action Cause C-349188) was not terminated favorable to HAAS.

On May 5, 1980, HAAS filed a Response to HASH's Motion for Summary Judgment and a cross Motion for Summary Judgment. In this Response to HASH's Motion for Summary Judgment HAAS first raised the question of collateral fraud by HASH in obtaining the Corrected Corrected Judgment in the underlying malicious action (Cause C-349188). In this cross Motion for Summary Judgment HAAS first raised the question of "final termination" verses "favorable termination". These questions were

directly raised before the trial court, which chose to ignore the question of collateral fraud and determined that a "favorable termination" was an essential element in an action for malicious prosecution.

The trial court by minute entry granted Summary Judgment in favor of HASH on June 3, 1980, stating that the prior proceedings (Cause C-349188) were not terminated favorable to HAAS. (App.12a-16a).

Proceedings in the Appellate Courts

HAAS made a timely appeal to the Arizona Court of Appeals raising the following issues:

1. Whether a Judgment Resulting From a Stipulation to a Summary Judgment in a Civil Matter Constitutes a Favorable Termination of Litigation as a Basis for a Malicious Prosecution Suit.

2. Whether There Are Any Genuine Issues of Material Fact Which Preclude Granting the Summary Judgment of Plaintiff Haas Against Defendant Hash.

On October 14, 1980, HAAS filed his Opening Brief which raised the questions relating to the Corrected Judgment and the "favorable termination". The Arizona Court of Appeals on July 27, 1982, entered a Memorandum Decision affirming the Judgment of the trial court. (App.1a-11a). On August 11, 1982, HAAS filed a timely Motion for Rehearing (App.21a-37a) and on September 13, 1982, HAAS filed a Petition for Review with the Arizona Supreme Court (App.38a-39a), both of which were denied.(App.17a-18a & 19a-20a).

The Arizona Court of Appeals addressed only the issue of "favorable termination".

REASONS FOR GRANTING THE WRIT

The Arizona Court of Appeals' decision denied HAAS of due process of law. Their holding that the procedural requirement of a "favorable termination" rather than a "final termination" should not be allowed to interfere with HAAS's right to substantive due process. The holding by the Arizona Court of Appeals that any civil action terminated pursuant to negotiations, agreement and stipulation, even to such collateral matters as attorney fees, which have no relation to the merits of the case, does not constitute a favorable termination as is necessary for maintenance of an action for malicious prosecution deprives the victum/defendant in a malicious and unfounded civil action of any recourse unless he is able to protract the judicial process to a full hearing on the merits. This requirement of protracted litigation resulting in a decision on the merits raises substantial questions of due process requiring plenary consideration.

The refusal by the trial court and the Court of Appeals to recognize that the malicious and unfounded civil action complained of (Cause C-349188) was an out and out fraud and that the Corrected Corrected Judgment in Cause C-349188 was procured by collateral fraud is a travesty of justice and must be reformed.

- I. The Arizona Court of Appeals Violated Due Process by Not Ruling that the Corrected Corrected Judgment in the Underlying Malicious Action, Cause C-349188, Was Procured by Collateral Fraud, and Did Not Avail HASH of a Complete Defense in an Action for Malicious Prosecution.

Collateral Fraud justifying equitable relief against a judgment or decree means some intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy. Black's Law Dictionary, Revised Fourth Edition, 1968, p. 789.

The Arizona Court of Appeals held:

"One of the essential elements of a claim for malicious prosecution is that the prior proceedings be terminated in favor of the

plaintiff in the malicious prosecution action. (citations omitted). If the plaintiff in an action for malicious prosecution fails to establish the essential element of a 'favorable termination' of the prior proceedings the defendant is entitled to judgment as a matter of law." (citations omitted). (App. 4a).

This holding is contrary to law. The law in this area was well settled by this Court in Crescent Live Stock Co. v. Butchers' Union, 120 U.S. 141 (1887):

"But the rule in question, which declares that the judgment or decree of a court having jurisdiction of the parties and of the subject-matter, in favor of the plaintiff, is sufficient evidence of probable cause for its institution, although subsequently reversed by an appellate tribunal, was not established out of any special regard to the person of the party. As we have already seen, it will avail him a complete defense in an action for a malicious prosecution, although it may appear that he brought his suit maliciously for the mere purpose of vexing, harrassing, and injuring his adversary. The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule, therefore, has respect to the court and to its judgment, and not to the parties, and no misconduct or demerit on their part, except fraud in procuring the judgment itself, can be permitted to detract from its force. (Emphasis Added)

The Court must consider this argument in the light of the irrefutable facts as established by the purchase contract (App 45a-53a); the mortgage assignment (App. 62a-64a); and the dispositions of HASH and ROWE in the underlying action (Cause C-349188). Hash prepared and signed a Third Party Complaint alleging that HAAS fraudulently misrepresented a mortgage and assignment to HASH's client, YATES, to induce her to sign the escrow instructions. HASH did this, knowing full well that the mortgage and assignment did not exist at the time of the signing of the escrow, because HASH had not yet created them. These documents were drawn by HASH and ROWE at the request of HASH more than a month after escrow had closed. HAAS had no knowledge of these instruments until several years later when the malicious action was filed.

On October 16, 1979, HAAS filed a Motion for Summary Judgment in the underlying action (Cause C-349188), and oral argument was sched-

uled. HASH, with over two years of discovery and not one shred of evidence to support his allegations, advised HAAS's counsel, David Postal, that he was not going to oppose HAAS' Motion for Summary Judgment. (See Affidavit of HASH, App.75a). HASH knew that opposing the Motion for Summary Judgment would be futile and tried to salvage paying legal fees, if he could. HASH did not offer to settle, negotiate or compromise the action. HASH admits in this affidavit that " Third Party Plaintiff Yates did not want to proceed with the litigation..." He only offered to throw in the towel if he could save his client from paying attorney's fees. If HASH thought his client had a meritorious action, why was he afraid of paying attorney's fees? Obviously he was of the opinion that his client's action was without merit.

The trial court granted HAAS's Motion for Summary Judgment in the underlying malicious action (C-349188) and on January 9, 1980 signed the formal Summary Judgment. There was

no oral argument on the Motion. (App.65a). There was no written stipulation. Copies of the formal Summary Judgment had been sent to the Clerk of the Court and to HASH. The original was sent to the Honorable Goodfarb. The trial judge and clerk received their copies, as is evidenced by their presence in the record. The Complaint in the action at bar (Cause C-402225) was filed on January 11, 1980, over five weeks after the formal Summary Judgment was lodged with the Court and a copy sent ot HASH.

It was well into February before HASH notified the trial cour that he did not receive a copy of the formal judgment. Although the record established HASH's lack of veracity, the trial court accepted HASH's story that he did not receive a copy of the formal judgment and that the Judgment was in error, while disregarding the testimony of David Postal, counsel for HAAS. (See Affidavit of Postal, App. 81a)

David Postal, counsel of HAAS was so

outraged by the conduct of HASH that he delivered a letter (App. 99a) to the Honorable Goodfarf, setting forth at least a prima facia case of collateral fraud. He stated in part:

"By June 1978, I had determined that Mr. Hash had in fact been the one who accepted the offer made, had later gone back and demanded, received, and prepared the instruments for additional security, all outside of the knowledge of my client the third party defendant.

Based on that knowledge I contacted Mr. Hash by telephone, and informed him that I believed his law suit was without basis, that I felt continuation of this matter would result in abuse of process, malicious prosecution action being brought against him, and with my client's permission offered to stipulate a settlement for a mutual stipulation to dismiss the action at that time, no further ramifications on either side.

Mr. Hash rejected out of hand this offer for a stipulated dismissal, and when it was determined the Mr. Rowe was seriously ill, a Notice of his deposition was taken in order to preserve his testimony. Mr. Hash attended the deposition of Mr. Rowe at which time a record pertaining to the transaction between Mr. Rowe and Mr. Hash was made, Mr. Rowe has subsequently died.

Motion for Summary Judgment in the Yates matter was made in October, 1979, the Court properly setting a hearing date.

At no time did I authorize a Stipulation of Dismissal in this matter, but did stipulate I would not go after attorney's fees and seek

only \$65.00 in costs, as my letter of November 13, 1979 to Edgar Hash (App.103a) relating to costs stated.

.....

It is my belief that the form of Summary Judgment entered was entirely proper, but that if the Court deems that on equity Mr. Hash has the right to set aside the judgment then it should be set aside and not changed." (emphasis added).

The Corrected Judgment (Cause C-349188) in the underlying malicious action was signed by the trial court judge on April 3, 1980, three months after the Complaint in the case at bar (Cause C-402225) was filed. This corrected Judgment (App.86a) contains the language, "...there was no determination of the motion of the merits, and the stipuation indicated that such was not to be done." The Justices of this Court should draw upon their vast years of experience on the bench and ask themselves if they have ever seen language like this in an honest and legitimate judgment.

The fact that the original formal judgment lodged with the Court reflected a deci-

sion on the merits establishes that HAAS did not negotiate a settlement of the action and that YATES, represented by HASH, was simply not opposing the Motion for Summary Judgment.

The additional language in the Corrected Judgment that, "this determination has now been utilized by the Defendants Haas as the basis for a malicious prosecution action." is quite unusual, to say the least. Could it be that the trial court judge was over protective of this erring attorney, and that his concern was reflected in the language of the Corrected Judgment?

II. The Arizona Court of Appeals Violated Due Process by Affirming that the Underlying Malicious Action Must Terminate by a "Favorable Termination" rather than a "Final termination".

The essential elements of the tort of malicious prosecution with an underlying criminal prosecution are : (1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) with defendants as prosecutors, (4)

actuated by malice, (5) without probable cause and (6) causing damages. Slade v. City of Phoenix, 112 Ariz. 298, 300, 541 P.2d 550 (1975); Cullison v. City of Peoria, 120 Ariz 165, 169, 584 P.2d 1156 (1978) and Bearup v. Bearup, 122 Ariz. 509 (App), 596 P.2d 35 (1979; See also Overson v. Lynch, 83 Ariz. 158, 317 P.2d 948 (1957)).

Arizona also recognized the tort with an underlying civil proceeding. See Bird v. Rothman, 128 Ariz. 599, 627 P.2d 1097 (App. 1981) cert. denied 102 S. Ct.; Carroll v. Kalor, 112 Ariz. 595, 545 P.2d 411 (1976) (App.

There is contention in the case at bar over the second element, that the underlying prosecution terminated in favor of HAAS. In the case at bar, Petitioner alleges that the Corrected Corrected Judgment (Cause C-349188) was a favorable termination. Respondent argues that the termination was in favor of HAAS, but was not a favorable termination for HAAS. It is undisputed that the underlying malicious

civil action (Cause -C-349188) has been legally terminated.

In considering this issue the Arizona Court of Appeals stated:

Whether a stipulated judgment in a civil proceeding may be deemed a 'favorable termination' for purposes of a subsequent malicious prosecution action has not been directly addressed in Arizona case law. Other jurisdictions, however, have held that where the prior proceedings terminated as a result of voluntary negotiation, settlement, or consent of the parties, there has been no such 'favorable termination'. (Citations omitted)

In discussing the "rationale for disallowing termination pursuant to settlement as a 'favorable termination'", the Arizona Court of Appeals dismisses the body and essence of Minasian in favor of a footnote:

"A dismissal resulting from negotiation, settlement or consent is generally not deemed a favorable termination of the proceedings. ...In such a case the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of defendant's guilt or innocence." Minasian v. Sapse, 80 Cal.App3d 823, 827, 145 Cal. Rptr. 829, 832, n.4 (1978)

Although ignored by the Arizona Court of Appeals, the opinion of the Minasian Court, in the body of the opinion, which Petitioner

suggests reflects the intent of that Court,
states:

"... 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge.. against an innocent person. If the accused were actually convicted, the presumption of his guilt or of probable cause for the charge would be so strong as to render wholly improper any action against the instigator of the charge'.

Although the original proceedings in Jaffe was criminal, the gist of the statement is equally applicable to cases...where the main action is civil.

...
It is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding has been legally terminated.

...
Of course where the termination of the former proceeding is not on the merits it is somewhat more difficult to ascertain whether it indicated the innocence of the defendant in the action. Nevertheless, the theory is the same in testing a dismissal or other termination without a trial on the merits. 'If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination.'" Minasian v Sapse, App.145 Cal Rptr. 829,831 &832, 80 Cal.App.3d 823 (1978).

Based on these authorities it is respectfully submitted that the action was terminated in such a manner that it was favorable to HAAS.

The stipulation of HASH as attorney for YATES not to oppose the Motion for Summary Judgment is a confession that the Third Party Complaint was without merit.

The Arizona Court of Appeals, in echoing the argument of HASH, held that any negotiations between the parties creates an unfavorable termination, thus precluding a future malicious prosecution action by the defendant. To illustrate how ridiculous this argument is, if both attorneys agreed and stipulated that there should be no oral argument on the motion for summary judgment, and nothing else, then any judgment rendered by the court would be unfavorable to the defendant.

HAAS PRAYED FOR Judgment against YATES and was granted Judgment against Yates; the Third Party Complaint against HAAS was terminated, favorable for HAAS. Any termination of

of the action which resulted in HAAS paying no damages, attorneys fees or costs was favorable to HAAS. This termination of the action cannot be classified as unfavorable to HAAS, or a stipulated settlement. In addition, YATES was ordered to pay \$65.00 to HAAS as and for costs. This is also favorable to HAAS.

The Corrected Corrected Judgment reads, "...in conformity with the said stipulation and agreement of counsel...(App. 95a); the Minute Entry of the prior action dated November 16, 1979, states in part, "...the Court is advised that a stipulation of counsel has been reached and no one will appear this date ...IT IS ORDERED granting Summary Judgment in favor of...Haas in the sum of \$65.00." (App. 65a). The Trial court granted summary judgment in favor of HAAS. The Complaint was not dismissed by stipulation but by summary judgment. No stipulated judgment appears in the record. There was no stipulation as to the

judgment. There was no oral argument. In fact, there was no written stipulation of record. There are only affidavits from counsel describing what they agreed to. Therefore the Court must look to these affidavits to determine the substance of this agreement.

HASH, as counsel for YATES in the underlying malicious action, in his affidavit dated February 5, 1980, states in pertinent part, "...he (HASH) called David Postal, Haas' attorney, and informed him that the Third Party Plaintiff Yates did not wish to proceed with the litigation...That Postal...agreed to enter a Summary Judgment in favor of his client for costs only and no attorney's fees and that Postal thereafter advised affiant that the costs were as follows..."(App.75a).

David Postal, as counsel for HAAS in the underlying malicious action, in his affidavit dated February 19, 1980, states in pertinent part, "...he (David Postal)...received a call from Edgar Hash, that the tenor of the call

was that Hash did not wish to fight the Motion for Summary Judgment if Haas would waive attorneys' fees in the matter. ...Postal agreed to enter a Summary Judgment on (sic) the favor of his client for costs without attorneys' fees and advised affiant that the costs were...\$65.00." (App.81a).

There was no stipulation as to the merits of Haas' Motion for Summary Judgment. YATES, through her attorney, HASH, did not oppose the motion and, in effect, confessed judgment by agreeing to summary judgment in favor of HAAS, against herself.

HAAS's Motion for Summary Judgment was granted. The fact that YATES chose not to oppose the Motion does not negate the substance of the Motion. The only possible favorable termination of this underlying malicious action for HAAS was to have obtained a judgment against YATES dismissing the action. Not only did HAAS obtain the judgment against YATES, but YATES paid costs to HAAS. Where the

Plaintiff in a civil action seeks to mitigate losses and dismisses the action rather than taking it to the jury, and further agrees to the termination to avoid additional legal fees, costs and expenses, this cannot be held against the defendant in a subsequent action for malicious prosecution. To so hold would burden the courts with numerous worthless trials, and additional motion practice.

If there are negotiations or a negotiated settlement, the trial court must look to the subject of the negotiations, and if on the merits of the case, then the malicious prosecution action fails. However, if the negotiations relate only to the collateral issues, such as legal fees in this case, and not the merits of the case, then the malicious prosecution action prevails.

It is clear that the Arizona Court of Appeals erred. A negotiated settlement, of itself, is not an unfavorable termination. The subject of the negotiations must be

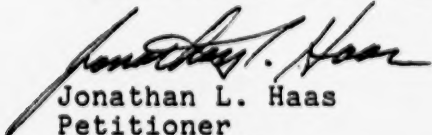
examined and only if they reflect unfavorably on the merits of the defendant's case is the termination unfavorable. In the case at bar HASH and YATES examined the merits of the case and concluded not only that the action was without merit, but that they would have to pay attorneys' fees and costs.

CONCLUSION

In its opinion, the Arizona Court of Appeals made several determinations which, taken singly or together, deprived Petitioner of Constitutional due process as guaranteed by the Fourteenth Amendment and as interpreted in decisions of this Court.

For these reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

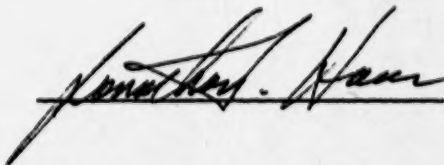


Jonathan L. Haas
Petitioner
P.O.Box 7461
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602-277-6001

Date: December 24, 1982

CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, i.e., on Respondent by placing same in an envelope and depositing it in the United States mail, with first class postage prepaid, addressed to counsel of record as follows:
Jefferson L. Lankford, Esq., Jennings, Strouss & Salmon, 111 West Monroe Street, 18th Floor, Phoenix, Arizona 85003, this 24th day of December, 1982

A handwritten signature in cursive script, appearing to read "Jonathan H. Hauer", is written over a horizontal line.